

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated February 4, 2013 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2  
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

## PART E – Summary of Facts

The ministry did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the following:

- 1) Cardiac Cath Lab Report dated March 30, 2011 with a conclusion of severe, dilated cardiomyopathy that may have progressed since previous noninvasive studies;
- 2) Medical Report- Employability dated September 18, 2012 completed by the appellant's family physician and indicating a primary medical condition of congestive heart failure and the associated restrictions described as "...has severe heart failure; gets dyspnea with slightest exertion."
- 3) Person With Disabilities (PWD) Application comprised of the applicant information dated October 16, 2012, a physician report and an assessor report both completed by the appellant's family physician of approximately 24 years and dated October 30, 2012;
- 4) Note dated January 24, 2013 from the appellant's family physician stating that "...this man has severe dilated cardiomyopathy and suffers from severe congestive heart failure. He is deemed to be not employable in any capacity permanently;" and,
- 5) Request for Reconsideration- Reasons.

### *Diagnoses*

The appellant has been diagnosed by his general practitioner with non ischemic dilated cardiomyopathy.

### *Physical Impairment*

- In the physician report, the general practitioner indicated that the appellant's cardiac ejection fraction was at one time 16% and his latest is 30% with medications. This is significantly low ejection fraction and he has 5 times the fatigue and dyspnea on slight exertion.
- Functional skills reported in the physician report indicated that the appellant can walk less than 1 block unaided, he can climb 5 or more steps unaided, he can lift 5 to 15 lbs. and has no limitation with remaining seated.
- The physician reported that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform his daily living activities (DLA) and he has a prosthesis or aid for his impairment. The physician wrote that the appellant "...has internal cardiac device which is an implanted defibrillator."
- In the assessor report, the general practitioner noted that the appellant has severe heart pump failure and he gets short of breath easily. The appellant takes significantly longer when walking outdoors and climbing stairs and is independent with standing. With respect to lifting and carrying and holding, the physician commented that the appellant is "...unable to lift heavy objects."
- The general practitioner did not indicate any assistive devices used by the appellant.
- In his self-report, the appellant stated that his congestive heart failure started in late 2010 when his heart began beating erratically. The appellant stated that he experienced incidents of struggling for air. The appellant stated that an angiogram revealed he had a heart pump rate of 16% efficiency whereas the normal heart pump rate for a healthy person is closer to 60%. The appellant stated that he wound up having to take 7 different prescribed pills daily.
- The appellant stated that he had an Internal Cardiovascular Defibrillator (ICD) installed through surgery but he continued to feel light-headed and weak because his blood circulation is insufficient.
- The appellant stated that it was recommended that he not strain himself with activities such as heavy lifting or using machinery. He noticed that even the most mundane activities such as walking a flight of stairs wore him out.
- The appellant described an incident where the ICD was activated and caused him to fall and break a

finger. He now experiences difficulty and pain with carrying things.

- The appellant stated that he has avoided any kind of activity that would raise his heart rate for fear that his ICD device would falsely fire off again and he cannot go long distances anymore without struggling for air.
- In his Request for Reconsideration, the appellant stated that his physician indicated that his health issues are long-term and that he should not seek employment for the rest of his life.

#### *Mental Impairment*

- The general practitioner did not diagnose a mental disorder but commented in the assessor report that mentally the appellant is "...depressed and anxious especially when alone."
- The general practitioner reported the appellant does not have difficulties with communication and has a good ability to communicate in all areas.
- The general practitioner reported significant deficits with cognitive and emotional function in emotional disturbance and motivation.
- In the assessor report, the general practitioner indicated moderate impacts with cognitive and emotional functioning in the areas of emotion and motivation and no impacts in the other 12 areas of functioning. The general practitioner did not provide further comments or narrative regarding the impacts.
- The general practitioner indicated that there are no restrictions and the appellant is independent in all aspects of social functioning, with good functioning in both his immediate and extended social networks.
- In his self-report, the appellant stated that he began to feel discouraged by the impacts from his health condition. The appellant stated that he is depressed and discouraged and it is overwhelming at times.

#### *Daily Living Activities (DLA)*

- In the physician report, the general practitioner indicated that the appellant is not restricted with personal care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, use of transportation, management of finances and social functioning. He is restricted on a continuous basis with mobility outside the home, and the physician has noted "slightly."
- In the assessor report, the general practitioner indicated that all tasks of all DLA are performed independently.
- In his self-report, the appellant stated that he began to feel discouraged when he found that walking through a grocery store took all of his strength and left him gasping for air at the end of the day.
- The appellant stated that, as a result of the injury to his finger, when he carries bags of groceries with his left hand, his hand gets sore and painful.

#### *Need for Help*

- The general practitioner reported that the appellant does not require any assistive devices.
- The general practitioner indicated in the assessor report that help required for DLA is provided by the appellant's family and friends.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision.

At the hearing, the appellant provided the following oral evidence:

- The appellant stated that he has a physical impairment but his injuries are internal. The appellant pointed out that his physician has referred to his condition as 'severe' dilated cardiomyopathy and 'severe' congestive heart failure, and this is a scientific, medical opinion. His physician has not used the words "mild" or "acute" to describe his condition.
- The appellant stated that his internal injuries have restricted his physical well-being.

- The appellant stated that because of his ailment, his DLA have been restricted. He needs to have someone always within earshot to monitor his condition. He has called 9-1-1 and they had to re-start his heart.
- The appellant stated that when his physician reported that he is not employable in any capacity permanently, this means that he could not even have a job where he was seated and greeting people, that his doctor has said this would be too much for him. This illustrates how far things have gone regarding his health and the severity of his condition.

The panel admitted the appellant's oral evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing a self-report by the appellant about his medical condition and being in support of information that was before the ministry on reconsideration.

The ministry did not attend the hearing and relied on its reconsideration decision.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

### Persons with disabilities

2 (1) In this section:

**"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

**"daily living activity"** has the prescribed meaning;

**"prescribed professional"** has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### Definitions for Act

2 (1) For the purposes of the Act and this regulation, **"daily living activities"**,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

- (iv) use public or personal transportation facilities;
  - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
  - (vi) move about indoors and outdoors;
  - (vii) perform personal hygiene and self care;
  - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
  - (ii) relate to, communicate or interact with others effectively.

The panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by the evidence of his fatigue and dyspnea (shortness of breath) on the slightest exertion due to non ischemic dilated cardiomyopathy.

The ministry points out that the appellant's general practitioner reported that the appellant is able to walk less than 1 block unaided and to climb 5 or more step unaided, to lift 5 to 15 lbs., and that he has no limitations to sitting. The ministry argues that the physician indicated that the appellant takes significantly longer with walking outdoors and climbing stairs; however, no information is provided on how much longer it takes the appellant to perform these activities. The ministry argues that the appellant's physician reported that the appellant has no restrictions with his DLA, with the exception of mobility outside the home.

### *Panel Decision*

The diagnosis of a medical condition is not itself determinative of a severe impairment. To assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage his DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach well when it defines the word "impairment" in the physician report as being "a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of 24 years, diagnosed the appellant with non ischemic dilated cardiomyopathy and described his ejection fraction of 30% as "significantly low" and that he has 5 times the fatigue and dyspnea on slight exertion. The medical practitioner reported that the appellant has severe heart pump failure and gets short of breath easily. The appellant is assessed as able to walk less than 1 block unaided, to climb 5 or more steps unaided, and to lift 5 to 15 lbs., and that he requires an aid for his impairment in the form of an internal cardiac device which the physician described as an "implanted defibrillator." The panel finds that this device delivers treatment to the appellant in the case of an irregular heart beat and, therefore, does not fall within the definition of "assistive device" as set out in the legislation as being "...a device designed to enable a person to perform a daily living activity that... the person is unable to perform." The appellant stated that it was recommended that he not strain himself with activities such as

heavy lifting or using machinery and he noticed that even the most mundane activities such as walking a flight of stairs wears him out. While the appellant is assessed as taking significantly longer when walking outdoors and climbing stairs, there is no information provided by the general practitioner as to how much longer this takes the appellant. The physician's assessment of the appellant's physical functional skills generally puts the appellant at the higher end of the spectrum and particularly when considering the physician's report that the appellant has no restrictions with his DLA, with the exception of slight restrictions to mobility outside the home. The evidence demonstrates that while the appellant's heart condition is described by his physician as a severe condition, the appellant nevertheless is able to function independently and effectively for a reasonable duration. Therefore, the panel finds that the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The appellant did not expressly advance an argument with respect to severe mental impairment, but argued that the severe nature of his heart condition has caused him to be depressed and discouraged and he finds it overwhelming at times.

The ministry's position is that the significant deficits with cognitive and emotional functioning identified by the medical practitioner in the areas of emotional disturbance and motivation are assessed as moderate, with no impacts to the remainder of his cognitive and emotional functioning.

### ***Panel Decision***

The general practitioner did not diagnose a mental disorder but commented in the assessor report that mentally the appellant is "...depressed and anxious especially when alone." The appellant stated that he is depressed and discouraged and he needs to have someone always within ear shot in case he has problems with his heart. The panel finds that the medical practitioner has not diagnosed depression, with an opinion that the condition is likely to continue for two years or more, as required by the legislation. The medical practitioner reported significant deficits with cognitive and emotional function in the areas of emotional disturbance and motivation, but assessed the impact as moderate, with no impacts in the remaining 12 areas of functioning. Further, the general practitioner indicated that there are no restrictions and the appellant is independent in all aspects of social functioning, with good functioning in both his immediate and extended social networks. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

### **Restrictions in the ability to perform DLA**

The appellant's position is that his physical impairment directly and significantly restricts his ability to perform DLA to the point that he requires the continuous assistance of another person in tasks of all of his DLA in the form of ongoing monitoring.

The ministry's position is that while the evidence of the prescribed professional is that the appellant requires continuous assistance with mobility outside the home, he also notes "slightly" and indicates that the appellant has no restrictions with his ability to perform the remainder of his DLA. The ministry argues that while it would be reasonable to assume that the appellant would be impacted and would require assistance due to his medical condition, the physician indicates in the assessor report that the appellant is independent in all of his DLA and there was no indication that the appellant takes significantly longer to perform them. The ministry argues that there is not enough evidence from the appellant's physician to establish that the appellant's impairment significantly restricts his ability to manage his DLA continuously or periodically for extended periods.

*Panel Decision*

The evidence of the appellant's long-time general practitioner is that the appellant can manage walking distances of less than 1 block without the use of an assistive device and that he takes significantly longer with walking outdoors. While the physician also identified continuous restrictions with mobility outside the home, he qualified this with a note that this is "slightly" restricted. The general practitioner also indicated that the appellant is not restricted with all other DLA, including personal care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, use of transportation, management of finances and social functioning. The general practitioner assessed all tasks of all DLA as being performed independently by the appellant. While the appellant stated that he requires continuous assistance in the form of constant supervision by another person "within ear shot", the panel finds that this has not been reflected in the information provided by the appellant's physician, the prescribed professional. Considering the evidence as a whole, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

**Help to perform DLA**

The appellant's position is that he requires the significant assistance of his friends and family to perform DLA and the ongoing use of an Internal Cardiovascular Defibrillator (ICD) as an assistive device.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry argues that the use of an assistive device such as an internal cardiac device does not in itself establish a severe impairment.

*Panel Decision*

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The evidence of the prescribed professional establishes that the appellant has an internal cardiac device which the panel finds does not meet the definition of "assistive device" as set out in the legislation, and the panel also finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the EAPWDA.

**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.